APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM AND SESSION, 1964

No. 14644
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN P. SPOMAR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 30, 1964

Before HASTINGS, *Chief Judge,* and DUFFY and CASTLE, *Circuit Judges.*

HASTINGS, *Chief Judge.* Defendant John P. Spomar is appealing from a judgment of conviction by the district court entered upon a three-count indictment returned November 27, 1962 charging him with "willfully and knowingly attempt[ing] to evade and defeat a large part of the income tax due and owing by him and his wife" for the calendar years 1958, 1959 and 1960, in violation of Title 26, U.S.C.A. §7201.

Defendant waived trial by jury and trial was to the court. He was found guilty as charged and received a two-year suspended sentence. He was placed on probation for two years, the first sixty days of which were ordered to be served in a local penal institution. He was fined $5000 and costs on Count I.

The dispositive issue on this appeal is whether defendant's constitutional rights guaranteed by the Fourth and Fifth Amendments to the Federal Constitution were violated by the district court's denial of defendant's motion to suppress evidence, voluntarily supplied to investigating officers by defendant, on the ground that defendant was unaware of his constitutional right to withhold such evidence.

Defendant operated a retail and wholesale cleaning business as a sole proprietorship in Chicago, Illinois. On May 31, 1961, two agents of the Internal Revenue Service entered defendant's shop, identified themselves as agents of the Internal Revenue Service and told defendant they wanted to talk with him about his income tax. They showed defendant his 1958 and 1959 returns and asked to see his records. Defendant voluntarily produced the records and they were examined by the agents from about 10:30 a.m. until 3:30 or 4:00 p.m., with time out for lunch.

The agents did not inform defendant he had a constitutional right to refuse to answer questions and produce records. Defendant does not contend, on appeal, that his consent to examine the records was obtained by misrepresentation, fraud, deceit, or misconduct on the part of the agents.

Revenue Agents, during the course of an investigation, have no duty to apprise a taxpayer that he need not

furnish requested information and that if he does furnish such information it may be used against him in criminal proceedings. *E.g., Greene* v. *United States,* 2 Cir., 296 F. 2d 841, 842-843 (1961); *United States* v. *Burdick,* 3 Cir., 214 F. 2d 768, 773-774 (1954), remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932, cert. denied, 350 U.S. 831. See *United States* v. *Achilli,* 7 Cir., 234 F. 2d 797, 805-806 (1956), affirmed, 353 U.S. 373. Defendant does not contend the agents had a duty to advise him of his right to refuse to furnish the requested information.

Defendant's argument is that he had no knowledge of his constitutional right to refuse to furnish information and therefore such information, although concededly given voluntarily to Internal Revenue Agents, could not be introduced into evidence in the trial against him. Defendant contends that the mere lack of knowledge of his constitutional rights is enough to vitiate the voluntary surrender of his records.

Defendant cites several cases to support this argument. He states, "The leading case is *Johnson* v. *Zerbst,* 304 U.S. 458, in which the court said at p. 465: 'The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.'"

Johnson and other cases cited by defendant are not authority governing the instant case. In these cases, the defendants either had been accused of crime or had not voluntarily consented to the search which produced evidence at a time their constitutional rights were alleged to have been violated by acts or omissions of government

agents or officials. In the case at bar, defendant was merely under investigation when the claimed violations occurred.[1]

"The important relevant inquiry in this case is whether appellant [taxpayer] freely gave his consent to have his records examined with the knowledge that his returns were being investigated." *United States* v. *Wheeler*, 3 Cir., 275 F. 2d 94, 97 (1960), cert. denied, 363 U.S. 828.

In sum, we find in this case the Revenue Agents made known to defendant they were investigating his income tax returns and asked to see his records. With this knowledge, defendant voluntarily produced his records for examination by the agents. There was no misrepresentation, fraud, deceit or misconduct on the part of the agents to gain defendant's consent to such examination. At that time, defendant had not been charged with a crime. This examination of defendant's records subsequently formed the basis of the present criminal charges against him.

Under these circumstances, even though defendant may not have been aware of his constitutional rights above referred to, we hold that his subjective lack of knowledge of such rights did not serve to vitiate the voluntary sur-

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[1] *E.g.* In *Johnson* v. *Zerbst, supra,* at 465, the Court stated, "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Evans* v. *United States*, 6 Cir., 284 F. 2d 393 (1960), held it to be error for the trial judge to instruct the jury in the absence of defendant. In *Wood* v. *United States*, D.C. Cir., 128 F. 2d 265, 276-277 (1942) the court stated that even if defendant had knowledge of his rights, the court must advise him of his constitutional rights before accepting a plea of guilty.

render of his records and did not thereby result in a violation of his right to remain silent and to withhold his private records. The trial court did not err in admitting in evidence the documents and information sought to be suppressed. See *Grant* v. *United States*, 2 Cir., 291 F. 2d 227 (1961).

To hold otherwise would bind the Government by defendant's subjective state of mind which is not subject of proof. It would also stand for the untenable proposition that one who has no duty to advise a taxpayer of his constitutional rights may nevertheless be held responsible for taxpayer's ignorance of such rights. Defendant concedes that no case has gone this far. We do not believe such a holding to be within the purview of the Fourth and Fifth Amendments.

Defendant asserts the district court erred in excluding the testimony of two of defendant's accountants who would have testified that defendant told them nine days after the records were turned over to the agents that he had been unaware of his constitutional rights. This testimony would not have been relevant and there was no error in excluding it.

The judgment appealed from is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion of the District Court denying petitioner's Motion to Suppress Evidence (A. 55-57):

Transcript of proceedings, February 20, 1963.

The Court: This matter comes up after a hearing on the defendant's motion to suppress. The motion was filed under Rule 41(e) of the Federal Rules of Criminal Procedure for the return of seized property and the suppression of evidence. Attached to the motion was defendants affidavit in which he states that on May 31st, 1961, Agent George Lorenz and another agent visited his place of business, and after identifying themselves as Agents of the Internal Revenue Service, they falsely and fraudulently misled the defendant by their conversation and demeanor, causing him to surrender certain specified records which they examined and copied while on the premises during the period of several hours.

Attached to the Government's answer to the motion was the affidavit of Special Agent George A. Lorenz. He stated that he and the agent accompanying him both identified themselves to the defendant, that neither of them misled or deceived him. The nature of the alleged deception practiced on defendant was not in any way specified in the motion. However, because defendant's affidavit was controverted by that of Lorenz, and a fact issue was thereby created, the Court ordered a hearing.

At the hearing, it was admitted by the defendant that the two agents properly identified themselves. As to the nature of the alleged deception, the defendant testified as follows:

> "Q. You make an allegation in your affidavit that by their conversation and demeanor, the agents false-

ly and fraudulently misled you and deceived you?

"A. Yes, I believe that they did at this time.

"Q. In what respect, sir?

"A. I didn't know my Constitutional rights at the time.

"Q. Is that your sole basis?

"A. Yes, I would say that that is my sole basis."

After a careful consideration of the evidence adduced at the hearing and the memoranda filed by the parties, the Court is of the opinion that the facts of this case clearly bring it within the holding of *United States* v. *Achilli*, 234 F. 2d, Seventh Circuit, which involved a similar factual situation. There the Court approvingly quoted the following at page 805:

> "The evidence is silent as to whether Agent Forbes began the investigation as a routine examination to ascertain the civil liability of the defendants or intended from the beginning to search for evidence of crime. But even if the latter assumption be made, there was no violation of the taxpayer's Constitutional rights. The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance."

Since the uncontroverted evidence shows that there was no affirmative misrepresentation, fraud, deceit, or scheme to defraud practiced by these agents as alleged in defendant's affidavit, and since there was no affirmative duty on the part of the agents to inform him of his rights, the Court concludes that defendant's voluntary surrender of his records was not vitiated in any way, and that his consent to examine and copy them was freely given.

The motion for the return of the seized property and the suppression of evidence is therefore denied. That will be the order of the Court.